IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Criminal Appeal No. 563 of 2001
(Old No. 1421/1980)

Date of decision: 5-9-2003

For the approval of:-

Hon'ble Chief Justice S.H. Kapadia.

Hon'ble Mr. Justice Irshad Hussain, J.

-Whether the order/judgment should be sent to the reporters for reporting? ( )

-Whether the reporters be allowed to see the judgment? (Yes)

(N.C.Melkani)
P.S.

C.J.'s Court

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Crl. Appeal No. 563 of 2001

(Old No. 1421/1980)

1. Dev Raj S/o Munshi Ram,]
   Resident of village Amrit Nagar No. 1,]
   P.S. Rudrapur, District Udham Singh Nagar.]
   ]
2. Ram Swaroop S/o Sital Das]
   Resident of Dhimri Block,]
   P.S. Rudrapur, District Udham Singh Nagar]
   (since dead).] ----Appellants.

Versus

State of U.P. (now Uttaranchal)]----Respondent.

Mr. Arvind Vashishtha, Advocate on behalf of the appellant,]
Mr. S.P.S. Panwar, Govt. Advocate for the State.]

Coram: Hon'ble S.H. Kapadia, C.J.
Hon'ble Irshad Hussain, J.

Date: 5th September, 2003:

ORAL JUDGMENT: [Per Hon'ble Chief Justice]

1. This appeal has been filed by Dev Raj and Ram Swaroop residents of village Amrit Nagar and Dhimri respectively in Rudrapur, district, Udham Singh Nagar. Both the appellants (hereinafter referred as accused) were found guilty of offence under section 302/34 of Indian Penal Code. Both of them were convicted. Each of them was sentenced to undergo imprisonment for life. Ram Swaroop has since died; appeal filed by him stands abated.

2. Certain facts which are undisputed as they emerge out of the evidence in the case and the statement of the accused are as follows:-

The accused were maternal cousins. Accused Dev Raj is the grand son of informant Rangu Ram (P.W.1) Rangu Ram had two sons and the elder of the two, Munshi Ram was the father of the said accused. He died before the occurrence of the case. The other son of informant was Om Pakash (deceased), the victim of the case. Rangu Ram was the resident of village Jogipura of P.S. Bajpur, District Udham singh Nagar. About five years before the

occurrence he had sold his property and migrated to village Prafulla Nagar P.S. Rudrapur district Udham Singh Nagar and settled there. He had also purchased 12 acres of land of Prafulla Nagar in the name of his second son Om Prakash deceased. Rangu Ram also acquired 6 acres of land for support of the family of his elder son late Munshi Ram and it used to be cultivated by the accused Dev Raj as being the elder son of late Munshi Ram. Informant and Om Prakash were residing together while occupying separate huts. The village type house of the informant consist of three huts and the third hut was in the occupation of his daughter eye witness, Sundara Bai (P.W.3) and son-in-law Jai Ram (who is not a witness in the case). Eye witness Lal Chand (P.W.2) resident of village Amrit Nagar No.1 P.S. Rudrapur is the real brother of said Jai Ram. Witness Jai Ram (P.W.8) is the another son-in-law of the informant. His real brother Punjab Ram (P.W.7) also resident of block Dhimri of P.S. Rudrapur is also a witness in the case. It is also admitted fact that the death of Om Prakash deceased was homicidal as was also established by the medical evidence of Dr. N.B.Pant (P.W.5).

2. The prosecution case was as follows.

On 07-03-1979, the deceased Om Prakash after dinner went to his hut. There he lied on his cot reading a book. The deceased was reading the book from the light emanating from a kerosene Dibiya (lamp) placed on one of the legs of the cot. That night P.W.1 had a guest, Lal Chand. Lal Chand and P.W.1 had taken their dinner and they were resting in the hut of P.W.1. At that time, Munnibai, daughter-in-law of P.W.1 and wife of the deceased came to P.W.1 to borrow a Bidi. At that time P.W.1 heard voices of Dev Raj quarrelling with the deceased. Accused Dev Raj threatened the deceased saying he would see to it as to how he would become the owner of 12 acres on demise of P.W.1. Accused Dev Raj had sold 2 acres out of 6 acres of land under his cultivation and pocketed the consideration and, therefore, the deceased, as uncle of Dev Raj, had summoned Dev Raj and had scolded him for disposing of 2 acres of land because Dev Raj was irresponsible towards his mother, brothers and younger sisters. This quarrel had led to the disputes

between Dev Raj and the deceased. Before the incident, there were frequent quarrels on this point. In fact, Dev Raj was claiming ½ share in 12 acres of land, which was disputed by the deceased.

4. On the night of the incident, around 10.00 p.m., P.W.1, P.W.2 and P.W.3 all heard the threatening words of Dev Raj, which made them come out of their respective huts. They saw accused Dev Raj and Ram Swaroop (deceased) armed with weapons. They saw the accused fired in the direction of Om Prakash. P.W.1, P.W.2 and P.W.3 rushed to save Om Prakash but when Dev Raj and Ram Swaroop saw P.W.1, P.W.2 and P.W.3 coming towards them, they threatened P.W.1, P.W.2 and P.W.3 and therefore these witnesses could not proceed further. Thereafter, Dev Raj and Ram Swaroop fled. On entering the hut, P.W.1, P.W.2 and P.W.3 saw Om Prakash (deceased) in agony. They took Om Prakash to Dineshpur Hospital on a tractor with the help of some of the villagers. At Dineshpur, there were no doctors in the night. Om Prakash died on the way. His body was taken to police out post. In the early morning at 1.05 a.m. of 08-03-1979, P.W.1 dictated the oral F.I.R. to the Moharir (P.W.6) at the police out post. Thereafter, on 08-03-1979 steps were taken by the Investigating Officer (P.W.10) to seize the pillow, towel and Angochha, a box hit pellets, empty cartridges and Kerosene Dibiya. Inquest report was also made by the Investigation Officer on 08-03-1979. The I.O. has also arrested the accused on 08-03-1979 at 10.30 p.m. The accused were charged on 10-07-1979 of committing offence punishable under section 302/34 I.P.C. by I Additional Sessions Judge, Nainital.

5. –The prosecution examined-Rangu Ram (P.W.1), Lal Chand (P.W.2), Sundara Bai (P.W.3), Hari Chand (P.W.4), Dr.Pant (P.W.5) who had performed the autopsy, Constable Clerk, Gopal Dutt (P.W.6), Punjab Ram (P.W.7), Jai Ram (P.W.8), Ballastic Expert, Om Prakash Tripathi (P.W.9) and Anand Prakash (P.W.10) the I.O. in support of the case of the prosecution.

6. Of these witnesses informant eye-witness Rangu Ram (P.W.1) supported the prosecution case by narrating the version as

contained in the F.I.R., Ex.Ka.1 proved by him and which has been reproduced above. Eye-witnesses Lal Chand (P.W.2) and Smt. Sundara Bai) P.W.3 corroborated the prosecution version by deposing that they saw both the accused firing shots from their respective arms hitting the victim Om Prakash who was lying on his bed in the hut. According to them accused wielded their arms from out side the opening of the hut of Om Prakash. Both of them claimed to have come out of their huts as was also the case with Rangu Ram on hearing noise of oral altercation between the accused Dev Raj and victim Om Prakash. As stated above source of light to read the book was a kerosene lamp (Dibiya) kept on one of the legs of his cot. The accused on being challenged by the eye-witnesses fled from there. The witnesses also gave out that the occurrence took place around 10.00 p.m. and the night was moonlit.

7. Witness Hari Chand (P.W.4) is a witness of the relevant fact. He had that night gone to the house of his in-laws in village Amrit Nagar along with his brother-in-law Bhola Ram. While returning from Amrit Nagar he had heard noise of gun fire coming from the house of the informant. He then went in that direction and in the way saw both the accused running away with their respective arms from the direction of the village Prafulla Nagar. He reached the house of Rangu Ram where he was told that the accused have run away after making assault by their arms on victim Om Prakash. Next day of the occurrence a box having pellet marks and kerosene lamp (Dibiya) were seized in his presence by the Investigating Officer vide memos, Ex.Ka.2 and Ex.Ka.3 respectively, from the hut of the deceased. Two empty cartridges and four graphs were also seized by the Investigating Officer from the scene of the occurrence in his presence vide memo, Ex.Ka.4.

8. Witnesses Punjab Ram (P.W.7) and his brother witness Jai Ram (P.W.8) residing at a distance at about one furlong from the place of the occurrence have heard noise of gun fire around 10.00 p.m. on that day. They stated that since noise came from the side of the house of the informant they at once went there. They found that

Om Prakash had sustained fire arm injury and was writhing in pain. The injured was then taken to Dineshpur in a tractor trolley. P.W.7 also proved factum of seizure of pillow, towel, clothes and Angochha seized by the Investigating Officer on 08-03-1979, vide memo, Ex.Ka.8. P.W.8 is another witness of the seizure of items vide memos, Ex.Ka.2, Ex.Ka.3 and Ex.Ka.4 referred above in relation to the evidence of P. W.4.

9. P.W.6 Gopal Dass was a Moharir in the police station at Dineshpur. He had stated that on 8th March 1979, P.W.1 had come to the Chauki and he had dictated the F.I.R. P.W.6 has deposed that the F.I.R. has been written strictly as per the statements given by P.W.1, word to word.

10. The Ballistic Expert Om Prakash Mani Tripathi (P.W.9) proved his report dated 30-04-1979, Ex.Ka.9 which was prepared after scientific examination of the gun and country made pistol material exhibits 8 and 12 respectively by making the use of these weapons and then comparing the result with the signs of breach and chamber of the weapons with the two empty cartridges which were attached from the scene of the occurrence. The result was that the two empty cartridges attached were fired from these weapons. As stated in regard to the earlier evidence these weapons were recovered on the pointing of the accused. He also proved report Ex.Ka.10 pertaining to test of barrels of the weapons having smell and presence of gun power indicating these were not cleaned after last use.

11. Anand Prakash (P.W.10) was the Sub-Inspector (Investigation Officer). He has stated that on 8th March 1979 he had appointed Panches for preparation of Panchayatnama of the dead-body. That, the Panchayatnama was read out to the Panches. That he had taken photographs. That, he had made arrest on 8th March 1979. That, he had taken the above statements of the witnesses.

12. The I Addl. Sessions Judge, Nainital, after considering the evidence of the witnesses, came to the conclusion that Dev Ram and Ram Swaroop were guilty of offence under section 302/34

I.P.C. and accordingly both of them were convicted of the offence and each of them were sentenced to undergo imprisonment for life.

13. Being aggrieved by the judgment of the Addl. Sessions Judge Nainital, Dev Raj and Ram Swaroop have come by way of appeal to this Court. During the pendency of the appeal, Ram Swaroop died, his appeal stands abated accordingly.

14. Heard Sri Arvind Vashishtha learned counsel for the accused and Sri S.P.S. Panwar learned Government Advocate for the State and we have carefully considered the evidence on record, the circumstances and the probabilities of the case.

15. Learned counsel for the accused at the outset contended that in this case, memo of recovery of weapons had not been placed before the Trial Court. That, moreover accused were tried under section 25 of the Arms Act and acquitted. That, on such acquittal, the alleged circumstance of accused Dev Raj possessing the weapon (gun), as per the evidence of the ballistic expert is ruled out and, therefore, in this case this Court has to see the oral testimony only. Learned Government Advocate concedes that in this case before the trial court, the memo of recovery of arms was not placed. In the absence of corroborative evidence of recovery we can not rely on the statement of Ballistic Expert (P.W.9).

Mr. Vashishtha next contended that in the F.I.R., P.W.1 stated that accused Dev Raj was armed with pistol whereas before the Court, P.W.1 stated that he was carrying a gun. We do not find any merit. We have gone through the F.I.R. and the statement of P.W.1 before the trial court. Both F.I.R. and the statement of P.W.1 show that accused Dev Raj was reckless. He never bothered about his brothers and sisters and his widowed mother. He sold land of his father. He sold 2 acres of land out of 6 acres given by his grand-father (P.W.1) for the support of his family. He was, therefore, scolded by his deceased uncle as irresponsible. This had made him angry. He had, on the other hand, made a claim to the land admeasuring 12 acres given to his uncle by P.W.1 That, on the night of 07-03-1979 at around 10.00 p.m., accused Dev Raj had

shouted at his uncle who was in his hut reading a book. That, the shout had brought out P.W.1, P.W.2 and Munni Bai from his hut. That the huts of P.W.1 and P.W.3 and that of deceased were close to each other. That, P.W.1 had seen accused Dev Raj and Ram Swaroop outside the hut of the deceased. That, P.W.1, P.W.2 and P.W.3 had seen accused firing shots in direction of the deceased from out side his hut. That, this basic positive evidence of P.W.1 is not only consistent with the F.I.R. but is also consistent with the evidence of P.W.2, P.W.3 and P.W.6 (Moharir).

16. Learned Advocate for the accused next contended that no blood-stains were found on the ground and, therefore, the prosecution has not proved that the incident had taken place in the hut of the deceased. We do not find merit. In this case, the post mortem report (Ex. A-5) shows the nature of injuries. It is as follows:-

(i) Round 1cm x 1cm, fire arm would with surrounding skin burnt and blackened in an area of 2cms. Margins inverted over right check front of check bone prominence. Direction of wound was upwards, inwards and lower depts. to maxilla probe extend into right maxillary cavity (wound of entry).

(ii) Round wound 1cm x 1cm fire arm over right frontal bone area of skull, 5 cms above from right eye-brow. Margins were inverted. Direction inwards, backwards and into the left side from right side of ear (wound of entry). No surrounding skin (hair) were burnt or blackened.

The seat of the first injury is on right cheek bone and the pellet travelled upwards in the opposite side whereas the second injury is on right side of the frontal bone in the head and the pellet goes to the left as per the diagram in the post-mortem report, Ex.Ka.5. In other words, the pellet has entered from right side of the cheek and head and travelled in opposite direction. Since the pellet has hit the bone part of the fact and looking to the nature of the injury and since there was no exit point, the blood could not have been profuse. However, blood was there on the pillow and towel, though not on earth. In such cases, one has to look at seat of the lodgment of the pellet, the dimension of injury, the position

where the pellet strikes etc. On the contrary, the box near the cot bears the mark of the pellets. That box is also indicated in the photos taken by the Sub-Inspector. That, the recovery memos show seizure of the box from the hut of the deceased, the kerosene Dibiya and empty cartridges from the place of incident. All these show that the incident had taken place in the hut of the deceased.

17. In this connection, it was argued that according to the evidence of P.W.1 and P.W.2, the height of the door of the hut of the deceased was only 2½ to 3 feet; that the height of the cot was almost the same; that the place where P.W.1 and P.W.2 stood and the place where accused stood and fired, alleged from outside the hut, was about 20 feet according to these witnesses and, therefore, unless accused had bent of set down to the level for the cot below the height of the door, it was not possible to hit at the deceased from outside by standing. That, it is not the case the prosecution that accused had sat and fired. Hence, the prosecution has failed to prove that the incident took place at the designated site. That this case comes in the category of 'not proved'. That, the prosecution has failed to prove that the deceased was killed in his hut. That the baby lying on the cot, next to the cot of the deceased, is not injured, further shows that the incident did not take place inside the hut of the deceased. That, the evidence of P.W.1, P.W.2 and P.W.3 is contradictory. They are not clear as which of the accused was carrying a gun and which was carrying a pistol. Hence, prosecution has failed to prove that the incident took place in the hut of the deceased.

18. We do not find any merit in these arguments, P.W.1, P.W.2 and P.W.3 are the eye-witnesses. They were closely related to accused . They were simple villager. They were illiterates in terms of dimensions. Looking of their status, minor variations in the matter of the height of the door and direction are irrelevant. The evidence of P.W.1, P.W.2 and P.W.3 on the basis case of the prosecution shows that the accused had animosity towards the deceased; that on the night of incident on hearing the shouts of the accused, P.W.1 and P.W.2 had come out of their hut; that they saw

accused with the weapons fired at deceased; that the deceased was in his hut reading a book and that accused had fled. This was also witnessed by P.W.3, who had been both the accused outside the hut of deceased with weapons fired at the deceased. That in this case, the nature of the injuries shows the type of weapons used. Hence, whether accused was carrying a gun or a pistol is not relevant. The evidence shows use of the weapons from two different directions. That the F.I.R. is all comprehensive. That it was an oral F.I.R. It is dictated to the Moharir. That, minor variations in whether accused had a gun or a pistol were irrelevant. That P.W.1 had lost his son. That he was upset. This circumstance cannot be lost sight of. Lastly the evidence of the eye-witnesses stand corroborated by evidence of P.W.4, P.W.7 and P.W.10. It indicates that place of incident. Even P.W.4 had seen accused running away with the weapons from the place of the incident. The three huts of P.W.1 , P.W.3 and the deceased were clustered together. Even the articles seized by the Investigating Officer corroborates the evidence of P.W.1, P.W.2 and P.W.3. the box was in the hut of the deceased. It had pellet marks. It was seized by the Investigating Officer. He had prepared the seizure memo which has been signed by P.W.1. Even the kerosene Dibiya supports the evidence of the eye-witnesses. The Dibiya was seized by the Investigating Officer. So also the cartridges and pellets inside the hut all prove that the incident had taken place in the hut of the deceased. Further, the blood on the pillow and towel also corroborates the evidence of the eye-witnesses. As far as non-injury to the baby is concerned, it is clear that the pellets came from the west, hit the deceased on his cheek and deviated towards North-East. This is indicated by the spray of pellets. The kerosene Dibiya was at the back of the head of the deceased. The box was opposite to the baby. The box has been hit. It had pellet marks. Hence, the baby was not injured. It was argued by learned Advocate for the defence that if the pellets came from the west and if the accused were standing and not sitting the pellet would have hit the back of the head because the head was found by P.W.1, P.W.2 and P.W.3 in the opposite direction. We do not find

any merit in this argument. The pellet hit the right hand side of the cheek and it went towards the opposite side. With the impact the head turned. Hence, there is no merit in the above argument.

19. It is next contended that the accused was implicated on suspicion; that eye-witnesses were not witnesses to the recovery; that the witnesses to the recovery were got up; that P.W.3 in her evidence, has deposed that on the night of the incident her husbnd was in Punjab; that towel, pillow and Angochha were not recovered from the place of incident. We do not find any merit in the above arguments. The evidence of P.W.7 shows that the recovery of pillow, towel and Angochha were taken charge of by the Sub Inspector (P.W.10) in the presence of P.W.7 and in presence of other witnesses. They were put in the report. That, the report was read out to the Panches. That, they were sealed. That the inquest was done by Sub-Inspector (P.W.10) at Dineshpur. That Panches were nominated by Sub-Inspector. That, all the Panches inspected the body. To the same effect is the evidence of Jai Ram (P.W.8) who is the witness to the recovery of kerosene Dibiya and the box having pellet marks in the hut to the deceased. This basic evidence has credibility. The evidence of these two witnesses show recovery of above items. They are not shaken on the point of recovery.

20. With reference to the above submission it is also of significance that neither any of the witness was suggested not there is any indication whatsoever from the cross-examination of the prosecution witnesses that the place of the occurrence was changed or the events in regard to the actual occurrence were not in the sequence as narrated by the witnesses. When any occurrence of the nature took place the news spread like wild fire not only in the village of the occurrence but also in the adjoining villages and any attempt to make a change in the place of the occurrence and the sequence of events not only becomes difficult but in fact impossible in view of the things being brought to the notice of the large number of people. Keeping in view this aspect of the matter also we do not find any substance in the argument of the learned counsel who has in our view over emphasized the issue and not to any

advantage to the defence. We are also of the firm view that the cogent and reliable evidence of the witnesses as discussed above rule out the possibility that it was a case of blind murder which has not been witnesses by any person. The F.I.R. being prompt and oral, the evidence of the witnesses not being shaken by even their piercing and searching cross-examination further rule out the possibility of fabrication of the prosecution story. In short the occurrence took place at the time and place as alleged by the prosecution and established by the evidence on record and the peculiar circumstances and admitted facts of the case.

21. Lastly, it was argued that there was no motive for killing Om Prakash. Motive is not evidence. Motive is basically a reaction. However, since this argument is advanced we would like to point out that P.W.1 had two sons viz. Munshi Ram and Om Prakash. Munshi Ram had died earlier. On his death, accused Dev Raj disposed of the lands. He did not bother about his younger brothers and sister and widowed mother P.W.1, his grand-father, had given 6 acres of land to him for cultivation at Prafulla Nagar. Here also, accused Dev Raj sold 2 acres. On demise of Munshi Ram, the deceased became the eldest in his family after P.W.1. About P.W.1, accused Dev raj had stated that he was old and he would die shortly. Therefore, on demise of Om Prakash, accused Dev Raj would be the eldest for both the families because the daughter of the deceased was only six months old. On the other hand, P.W.1 is the grand-father of accused Dev Raj. P.W.3 is the aunt of accused. P.W.2 is the brother of Jai Ram (P.W.8), P.W.8 is the son-in-law of P.W.1. Therefore, there was no reason for the eye-witnesses to speak against the accused.

22. For the foregoing discussions and conclusions we do not find any substance and merit in this appeal and we, therefore uphold the conviction and sentence as awarded against the accused by the learned I Sessions Judge, Nainital per judgment and order dated 12-6-1980 passed in Sessions Trial no. 123/1979. The appeal is accordingly dismissed. The accused-appellant Dev Raj is in jail and

he shall serve out the sentence of life imprisonment passed against him.

23. Let copy of this judgment along with the record of the case be sent to the Court below for compliance. The Court below will give a compliance report within two months from the date of the receipt.

(Irshad Hussain, J.) **(S.H. Kapadia, C.J.)**

Melkani